BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A
Opinions of the Courts Below

The opinion of the Circuit Court of Appeals is, at time of this writing, not yet reported, but appears in the Record at pages 53 to 58. The opinion of the United States District Court for the District of Massachusetts is unreported and appears in the Record at pages 43 to 45 inclusive.

B
Jurisdiction

1. *Timeliness.*

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347 (a)].

The judgment of the United States Circuit Court of Appeals affirming the trial court was entered of record on the 29th day of May, 1941. (R. 59)

The petition for certiorari is filed herein before the expiration of three months from the date of the decree and judgment of the United States Circuit Court of Appeals.

2. *The Statute.*

The validity of the state legislation under the United States Constitution was drawn into question in this case and the decision of the United States Circuit Court of Appeals was wrongfully in favor of its validity. The legislation challenged here is an ordinance of the City of Haverhill, Massachusetts, which requires a license to sell or carry on a vocation upon the streets of the city.

The pertinent part of the ordinance is set forth on pages 6, 21, 28 and 43 of the Record. (See stipulation, Appendix A to this petition.) The existence of the ordinance as alleged was admitted by respondents.

In holding that the ordinance is not unconstitutional and did not abridge freedom of speech, of press and of worship to the petitioners, the trial court decided that the ordinance properly applied to the activity of petitioners and decided in favor of its validity as applied (R. 43-45), and the Circuit Court of Appeals affirmed the holding of the trial court by refusing to reverse the decision of the trial court. (R. 53-59)

From the beginning of the action the validity of the ordinance here challenged as being in contravention of the United States Constitution was thus drawn in question. The judgment of the trial court was in favor of the validity of such ordinance and the judgment of the Circuit Court of Appeals wrongfully approved such holding through its decision that the trial court did not abuse its discretion in refusing to grant the application for preliminary injunction.

C

Statement of the Case

A full statement of the case has been given herein (supra, pages 1 to 10) and for the sake of brevity will not be repeated but is here referred to.

D

Specification of Errors

The petitioners assign the following errors in the record and proceedings of said case:

The Circuit Court of Appeals committed fundamental

error in affirming the judgment of the trial court and upholding the decision of the trial court denying application for preliminary injunction because

1) The ordinance is invalid, as construed and applied by respondents, because it has been used and will be used to deprive petitioners of their rights of freedom of speech, of press and of worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871 as amended.

2) The facts as alleged, established by undisputed evidence and as found by the trial court, show that the trial court abused his discretion under 28 U. S. C. A. par. 227, in denying the application for preliminary injunction restraining future criminal proceedings against petitioners and other of Jehovah's witnesses under said ordinance for taking contributions on the street in exchange for the literature distributed by them.

And for these reasons it is reversible error for the United States Circuit Court of Appeals to refuse to set aside the judgment of the trial court declaring the ordinance to be constitutional and valid as applied to the activity of petitioners.

ARGUMENT

ONE

The ordinance is invalid, as construed and applied by respondents, because it has been used and will be used to deprive petitioners of their rights of freedom of speech, of press and of worship of Almighty God, contrary to the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871 as amended.

Petitioners are engaged in distributing literature of a nature protected by "free press" guarantee. They were distributing same on the streets, which place this Court has repeatedly held to be the natural and proper place for dissemination of information. The ordinance in question is aimed at peddlers of merchandise and is not specifically aimed at the sale of literature. However, the ordinance has been wrongfully applied by the respondents to such activity through the arrests and prosecutions of the petitioners. Such an ordinance may be properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets, but it is not appropriately applicable to regulate the sale and distribution of literature of the sort offered for sale by petitioners. *Schneider* v. *State,* supra.

It is the wrongful application of the ordinance by the respondents which makes the same unconstitutional as to the petitioners. In *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535, 545, the rule to be followed here is announced as follows:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment

> often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

The undisputed evidence shows that this method of distribution was one of the ways employed by the petitioners to preach the Gospel of God's Kingdom. It cannot be said that this is not an appropriate way to preach the Gospel, because it is not for the courts to say which way is or is not a proper mode of worship. That is to be determined solely by the creature in his conscientious endeavor to do the will of his Creator, the Almighty God. The application of the ordinance likewise deprives the petitioners of their right of worship of Almighty God, contrary to the Constitution.

The holding of the trial court is directly in conflict with the prevailing American rule announced by this Court in *Schneider* v. *State,* supra, *Lovell* v. *Griffin,* supra, and *Cantwell* v. *Connecticut,* supra. The holding of the trial court is clearly contrary to the holding of this Court, in the cases of *Grosjean* v. *American Press Company,* 297 U. S. 242; *Near* v. *Minnesota,* 283 U. S. 697, 707; and *Gitlow* v. *New York,* 268 U. S. 652, 666.

It is also contrary to many holdings of the appellate courts of many of the states where ordinances aimed at commercial peddling of ordinary articles of merchandise have been held unconstitutional as applied to the activity of Jehovah's witnesses in distributing literature and taking in exchange therefor contributions in money. These cases are: *People* v. *Kieran et al.,* 26 N. Y. S. (2) 291; *Tucker* v. *Randall* (N. J.), 15 A. (2) 325; *Commonwealth* v. *Anderson* (Mass.), 32 N. E. (2) 684; *City of Gaffney* v. *Putnam* (South Carolina Supreme Court opinion rendered June 2, 1941, unreported at time of this writing); *Semansky* v. *Stark, Sheriff,* 199 So. 129 (La.); *Thomas* v. *Atlanta,* 59 Ga. App. 520, 1 S. E. (2) 592; *Cincinnati* v. *Mosier,* 61

Ohio App. 81; *California* v. *Northum et al.*, 103 Cal. Supp. 295, ... Pac. (2) ...; *Village of South Holland* v. *Stein*, 26 N. E. (2) 868 (Ill).

We submit that the trial court clearly erred when it held (AS HIS SOLE AND ONLY REASON FOR DENYING THE APPLICATION FOR PRELIMINARY INJUNCTION) that the ordinance did not deprive petitioners, as applied, of their rights under the Constitution because they "sold" the literature; and that the right to protection against such a regulation in question extended only to "free distribution" and not to sale of literature. The Circuit Court of Appeals, in effect, also held the same by refusing to reverse the erroneous judgment of the trial court.

TWO

The facts as alleged, established by undisputed evidence and as found by the trial court show that the trial court abused its discretion under 28 U. S. C. A. par. 227 in denying the application for preliminary injunction restraining future criminal proceedings against petitioners and other of Jehovah's witnesses under said ordinance for taking contributions on the street in exchange for the literature distributed by them.

In spite of the fact that the trial court found that there was no question as to equitable relief and that the only question involved was the constitutionality of the ordinance the Circuit Court of Appeals found that the District Court did not abuse its discretion in denying the application for preliminary injunction.

The decision and holding of the Circuit Court of Appeals is clearly in conflict with established principles of

equity announced by this Court viewed in light of the undisputed evidence in this case. The opinion is contrary to *Ohio Oil Co.* v. *Conway,* supra, vacating order denying preliminary injunction where the court said:

> "Where the questions presented by application for interlocutory injunction are grave, and injury to moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while, if injunction be granted injury to opposing party, even if final decree be in his favor, will be inconsiderable, or may be adequately indemnified by bond, injunction will usually be granted."

In Volume 6, page 941, paragraph 3240 of *Cyclopedia of Federal Procedure* the right to preliminary injunction is discussed and among other things it is said:

> "Probability of right is sufficient to authorize a preliminary injunction. In many cases it is granted to preserve property in status quo during the pendency of a suit in which the rights to it are to be decided and that without expressing and often without having the means of framing any opinion as to such rights."

The holding of the Circuit Court of Appeals on this point is also contrary to *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 337; *Public Service Commission* v. *Wisconsin Tel. Co.,* 289 U. S. 67, 71; and *Prendergast* v. *New York Tel. Co.,* 262 U. S. 43, because the questions presented were grave*, the injury to the petitioners cer-

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**Hague* v. *C. I. O.* (Justice Stone): "No more *grave* and important issue can be brought to this court than that of freedom of speech and assembly, which the due process clause guarantees to all persons."

tain and irreparable in the denial of the application, and the final decree should be in their favor. Furthermore, in the granting of the injunction the injury to the respondents is inconsiderable and even if final decree be in their favor they may be adequately indemnified by a bond. Thus the preliminary injunction should have issued.

Petitioners have been repeatedly arrested and prosecuted under the ordinance, thrown into jail to there remain over each week-end under unhealthy surroundings, given a farce trial, convicted contrary to the evidence and law, forced to appeal, had their work frustrated and destroyed, suffered great pain and anguish, suffered loss of their work and occupations, incurred great expense in securing their release and appeals; all of which showed that they would suffer irreparable injury which was immediate, certain and great, without remedy for restitution in any way. Further facts showing lack of adequate remedy at law and irreparable injury appear in the affidavits of Howell and Flint. (R. 20-32) See also pages 4-7, supra.

The principle announced by the Circuit Court of Appeals is contrary to the case of *Hague* v. *C. I. O.,* supra, and the attempted distinction from facts of this case in the opinion (R. 57) finds no justification in law or reason, because the circumstances of both cases are identical. The holding is contrary to the discussion on equitable relief in that case; and also see discussion in the case of *Watson* v. *Buck* and *Buck* v. *Watson,* Nos. 610, 611, October Term, 1940.

Continuing violation of Constitutional rights affords a ground for equitable relief. *Johnson* v. *Wells Fargo & Co.,* 239 U. S. 234. In *Hague* v. *C. I. O.,* supra, Justice Stone said:

> "It is enough that petitioners have prevented respondents from holding meetings and disseminating information."

A case directly in point here is the case of *Dearborn Independent* v. *Fitzgerald,* 271 F. 479, where an injunction was granted restraining arrests of distributors of the "Dearborn Independent", where the court said:

> "Defendant's action, however, prevents other sales from time to time and from week to week. This is a continuing course of conduct, and, if not supported by a valid constitutional law or is in excess of authority conferred on them by any valid law or ordinance, becomes a continuing and repeated wrong. In this situation a court of equity has from time immemorial granted relief upon two well established principles: one is for the multiplicity of actions which would be necessary to redress a continuing and repeated wrong; the other is the irreparable nature of the injury inflicted; in that the damage is not susceptible of accurate ascertainment at law."

Cases in point holding that officials can be enjoined from enforcing unconstitutional criminal statutes and restraining *future* criminal proceedings are *Cline* v. *Frink Dairy Company,* 274 U. S. 445; *Ex Parte Young,* 209 U. S. 123; *Raich* v. *Truax,* 239 U. S. 33, affirming 219 F. 273; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456; *Adams* v. *Tanner,* 244 U. S. 590, 592; *Greene* v. *Louisville & Interurban R. R. Co.,* 244 U. S. 499, 506; *Home Telephone & Teleg. Co.* v. *Los Angeles,* 227 U. S. 278, 293; *Western Union Teleg. Co.* v. *Andrews,* 216 U. S. 165, and *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 217.

It is within the power and it is the duty of the United States Courts in instances such as here presented to restrain enforcement of an ordinance valid on its face which is applied and enforced in an unconstitutional manner. *Watson* v. *Buck, Buck* v. *Watson,* supra, decided May 26, 1941, by this Court. See also *Greene et al.* v. *Louisville & Interurban Railroad Co.,* 244 U. S. 499, 506-508, 522-531;

Sterling v. *Constantin,* 287 U. S. 393 (378); *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434; *Colorado* v. *Toll,* 268 U. S. 228, 230, and *Work* v. *Louisiana,* 269 U. S. 250, 254, where it is said:

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. Noble v. Union River R. R., 147 U. S. 165, 171, 172; Garfield v. Goldsby, 221 U. S. 249, 261, 262; Lane v. Watts, 234 U. S. 525, 540; Payne v. Central Pac. Ry. Co., 255 U. S. 228, 238; Santa Fe Pac. Railroad v. Fall, 259 U. S. 197, 199."

We submit that the ordinance is void on its face but if not so found by this Court it is manifestly unconstitutional as applied to the undisputed facts in this case.

The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. *Payne* v. *Hook,* 7 Wall. 425, 19 L. Ed. 260, 262; *Watson* v. *Sutherland,* 5 Wall. (72 U. S.) 78, 18 L. Ed. 582.

It is not enough that there is a remedy at law. It must be plain and adequate, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity. *Boyce's Exr.* v. *Grundy,* 3 Pet. 210, 7 L. Ed. 655; *Payne* v. *Hook,* supra; *United States* v. *Howland,* 4 Wheat. 108, 4 L. Ed. 526; *Osborn* v. *United States Bank,* 9 Wheat. 738, 841, 842; 6 L. Ed. 204; *Barber* v. *Barber,* 21 How. (62 U. S.) 582.

There may be a legal remedy, and yet if a more complete remedy can be had in equity, it is a sufficient ground for jurisdiction. *Wylie* v. *Coxe,* 15 How. 415, 14 L. Ed. 753, 755.

To bar equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of

the complainant. Where the remedy at law is not as practical and efficient to the ends of justice and its prompt administration, the aid of equity may be invoked. *Lewis* v. *Cocks,* 23 Wall. (90 U. S.) 466. *Boyce* v. *Grundy,* supra.

In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by the state practice. *Stratton* v. *St. Louis S. W. Ry. Co.,* 284 U. S. 530; *Scott* v. *Neely,* 140 U. S. 106, 110, 111; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379.

When irreparable injury is spoken of it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation of damages, but of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279, 306; *Chicago General R. Co.* v. *Chicago B. & Q. R. Co.,* 181 Ill. 605, 611, 54 N. E. 1026; *Newell* v. *Sass,* 142 Ill. 104, 115, 116, 31 N. E. 176; *Carpenter* v. *Capital Electric Co.,* 178 Ill. 29, 36, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286; *Lowery* v. *City of Pekin,* 186 Ill. 387, 398, 57 N. E. 1062, 51 L. R. A. 301.

It is a settled principle of equity jurisdiction that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. *Davis* v. *Wakalee,* 156 U. S. 680, 688; *Boyce* v. *Grundy,* 28 U. S. (3 Pet.) 210; *Watson* v. *Sutherland,* supra; *Rathbone* v. *Warren,* 10 Johns. (N.Y.) 587; *King* v. *Baldwin,* 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *American Insurance Co.* v. *Fisk,* 1 Paige (N. Y.) 90; *Teague* v. *Russell,* 2 Stew. (Ala.) 420; *Southampton Dock Co.* v. *Southampton Harbour & Pier Board,* L. R. 11 Eq. 254; *Weymouth* v. *Boyer,* 1 Ves. Jr. 416.

In the case of *Terrace* v. *Thompson,* 263 U. S. 197, 214-216, it was held that the plaintiff would not have to wait until a criminal action was brought against him in State courts to question the constitutionality, but if threatened

with prosecution, could enjoin if sufficient grounds in equity were shown. The court further held that the right to defend in the criminal action would not constitute adequate remedy at law.

In the case of *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 214, 216, the same principle was announced and the following additional statement made:

> "It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party. . . . The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. Bank of Kentucky v. Stone, 88 F. 383; Lincoln Nat. Life Ins. Co. v. Hammer, 41 F. (2) 12, 16."

To the same effect is the case of *Atlas Ins. Co.* v. *Southern, Inc.,* 306 U. S. 563, 569, which cites the following cases: *Risty* v. *Chicago R. I. & P. Ry. Co.,* 270 U. S. 378, 388; *De Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, 69; *Petroleum Exploration Inc.* v. *Public Service Com.,* 304 U. S. 209, 219.

In this connection, we ask that the Court carefully consider the case of *Railroad and Warehouse Comm. of Minn. et al.* v. *Duluth Street Ry. Co.,* 273 U. S. 625, 628, in which it was held to be unjust to put the plaintiff in an equitable action to the chances of reaching the same result by appealing to the State court.

On this point we would like to call attention to the significant and appropriate statement by Judge Clark in the case of *Nashville, C. & St. L. Ry. Co.* v. *McConnell,* 82 F. 65, 70 (C. C., M. D. Tenn., 1897), which reads as follows:

> "The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference by court of equity."

The case at bar is much stronger than any other case by this Court where an injunction has been granted restraining the enforcement of a statute (except the *Hague* case, supra), because the petitioners come into this Court clothed with the general right of a plaintiff in equity and in addition thereto are fortified with the statutory provision of Section 24 (14) of the Judicial Code, and Section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, which statutes make it mandatory upon federal courts to accept suits brought by any person to redress the deprivation, under color of law, of any civil right secured by the laws and Constitution of the United States. The very purpose in passing this statute was to protect civil rights and guarantee relief in the federal courts, and thus the rule in reference to the adequate remedy at law cannot be applied to deny jurisdiction in equity in civil right cases. However, in this case the petitioners do not have any adequate remedy at law. This very point was specifically covered in the *Hague* case, supra.

The holding of the trial court is contrary to the decision of the United States District Court for the Western District of Pennsylvania in the case of *Douglas et al.* v. *City of Jeannette,* ... F. Supp. ..., where enforcement of a peddling ordinance was restrained as to Jehovah's witnesses, and contrary to *Reid et al.* v. *Brookville et al.,* where that same court in ... F. Supp. ..., restrained the enforcement of ordinances of three boroughs and one city, prohibiting peddling on the streets and distribution of literature as applied to Jehovah's witnesses. It is also in conflict with another injunction decision in favor of Jehovah's witnesses by the United States District Court of Ohio, Southern District, reported in ... F. Supp. ..., styled *Zimmerman et al.* v. *London et al.* It is also in conflict with another injunction decision in favor of Jehovah's witnesses by the United States District Court of Idaho, reported in ... F. Supp. ..., styled *Kennedy et al.* v. *City of Moscow et al.* The de-

cision of the Circuit Court of Appeals is likewise contrary to each and every one of the cases hereinbefore cited.

CONCLUSION

Petitioners are burdened with heavy expenses, repeated arrests, loss of placements of literature and civil rights, and none can find adequate protection in defense of criminal actions brought in the state court. The respondents admit that they will continue to arrest and prosecute petitioners and other of Jehovah's witnesses found distributing literature on the streets and taking contributions therefor, all of which will continue to frustrate and destroy petitioners' lawful activity.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that errors complained of may be corrected and that to such end a writ of certiorari ought to be granted and this Court should review the decision of the United States Circuit Court of Appeals for the First Circuit.

Confidently submitted,

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